
IOWA UTILITIES BOARD
General Counsel, Customer Service Sections

Docket No.: FCU-2016-0006 (HLP-2014-0001)
Utility: In Re: Dakota Access, LLC
File Date/Due Date: April 28, 2016 / n/a
Memo Date: June 1, 2016

TO: The Board

FROM: Ben Flickinger

SUBJECT: Recommendation Memorandum

I. Background

Erin Riley filed an application for rehearing on March 31, 2016. Riley asked the Board to reconsider the “Standard Easement Rights Revised” filed by Dakota Access on March 16, 2016 and requested an amendment to address an indemnity clause related to damages and liability for general negligence and premises liability.

In a “Statement of Position, Comments” filed on April 12, 2016, Riley also argues Dakota Access is not bargaining in good faith to negotiate voluntary easements in lieu of condemnation proceedings. Riley argues that Dakota Access’ attorneys refuse to include provisions the Board has required in the AIMP and condemnation proceedings in a voluntary easement.

Dakota Access resisted the motion, arguing that Riley cannot seek rehearing because: 1) Riley was not a party to the proceeding and therefore lacks standing; 2) the Board has granted it the right of eminent domain over Riley’s property and the motion application does not state while Riley should be treated differently from other similarly affected landowners; and 3) Riley is requesting inappropriate relief by asking the Board to craft an indemnity provision. Dakota Access asserts Riley lacked standing to request rehearing because Riley did not intervene, testify, file prepared testimony, or file an objection in the HLP-2014-0001 docket at any point in time.

Riley filed a response to the resistance on April 22, 2016. The Response argued that Riley should be permitted to seek rehearing. Riley states she could not meaningfully participate or present evidence at the hearing since she had no reason to intervene by the intervention deadline in July of 2015. She also argues that as a landowner of a parcel potentially subject to eminent domain, she is inherently a party and has standing. Riley states she has been in negotiations

with Dakota Access' attorneys for approximately one year, and it was only when talks broke down that she had a reason to file with the Board.

Riley states further that she was only ever offered one contract and one lump sum before her parcel was listed on Exhibit H in Docket No. HLP-2014-0001. The voluntary easement she was offered did not reference the Agricultural Impact Mitigation Plan (AIMP). She also challenges whether she and the other owners of the parcel received proper notice. Finally, Riley challenges the language included or excluded by Dakota Access in the voluntary easement agreement sent to her by Dakota Access. Riley challenges language regarding the company's liability for damages to livestock and other items she requested to be added to the voluntary easement agreement.

In its April 28, 2016, order, the Board stated it would treat Riley's application for rehearing as a complaint and docketed it as Docket No. FCU-2016-0006. It required Dakota Access to file additional comments within seven calendar days of the order, and Riley and OCA to file comments within 14 calendar days of the order.

On May 5, 2016, Dakota Access filed an additional response after Riley's request for rehearing was docketed as a formal complaint. Dakota Access again argues that the Board should not grant indemnification rights, and has previously rejected the same suggestion in other cases. In re: ITC Midwest, LLC, Docket No. E-22156. Dakota Access states that the Iowa Code already requires it to pay actual damages caused by entering, using, or occupying the lands. Dakota Access also argues that it is bargaining in good faith, and that it has attempted to work with Riley's own proposed easement agreement by incorporating the AIMP by reference. Dakota Access also asserts that the Board does not have the power to force parties to enter into voluntary easements with specific terms; the Board can only determine the scope of condemnation easements. Finally, to the extent Riley is arguing it did not provide proper notice, Dakota Access states that it complied with Iowa Code § 479B.4 by sending notice to Riley.

II. Analysis

Riley raises three primary issues in her complaint. First, she argues that Dakota Access should be required to include an indemnification clause in its voluntary easement agreement with her. Second, Riley argues that Dakota Access will not include in its proposed voluntary easement terms the Board has already required to be included in the AIMP and otherwise is not bargaining in good faith with respect to securing a voluntary easement. Third, Riley argues that Dakota Access did not provide proper notice.

A) Indemnity Clause & Good Faith Bargaining

Riley's request for the Board to impose an indemnity clause is likely untimely or waived. Riley did not file an objection or intervene in Docket No. HLP-2014-0001 prior to the Board's hearing in this matter or the issuance of its Final Order on March 10, 2016. In the Final Order, the Board addressed issues with the proposed condemnation easements. Neither Riley nor any other party or objector requested the inclusion of an indemnity clause prior to the issuance of the Final Order. Thus, to the extent that Riley is now asking for relief that had not been raised previously, the request can be seen as untimely or waived.

Furthermore, even if the request were timely brought and not otherwise waived, the Board's Final Order does not require Dakota Access to agree to an indemnity clause. Riley and Dakota Access are free to include or exclude any terms in a mutually agreed upon voluntary easement that are lawful and not otherwise contrary to the appropriate provisions of the Iowa Code or the Board's rules. The Final Order required Dakota Access to continue to offer landowners the same terms and conditions previously offered prior to the issuance of the Final Order, but it did not require Dakota Access to offer or acquiesce to new terms that it had not previously agreed to at any stage of the negotiations. Riley has not asserted that Dakota Access previously agreed to include an indemnity clause but has since backed out of that agreement. While it is understandable why Riley would like an indemnity clause added to any voluntary easement, and Riley is free to continue to negotiate for the inclusion of such a clause, neither the Iowa Code nor the Board's Final Order requires Dakota Access to assent

Riley also argues that Dakota Access is not bargaining in good faith because it will not include language otherwise included in the AIMP, the condemnation easements, or other language that Riley has sought. As noted above, the Board generally does not intervene in the negotiation process for voluntary easements since the parties are free to include or exclude language as they deem acceptable. The terms of the AIMP cover all affected landowners as applicable, whether they have signed voluntary easements or are being subject to the use of eminent domain. Consequently, exclusion of those terms from a voluntary easement cannot be seen as bargaining in bad faith since they are already applicable. Again, Riley has not otherwise provided evidence that shows Dakota Access has reneged on previously agreed terms or otherwise bargained in bad faith. Instead, it appears that the parties simply have not reached an agreement for a voluntary easement. Staff therefore recommends that the Board dismiss Riley's complaint on these issues.

B) Notice Requirement

Riley also argues that Dakota Access did not provide proper notice because the notice was not sent to all seven interstate Grantors for the easements sought on the parcel at issue. Iowa Code § 479B.4 required Dakota

Access to give notice of the informational meeting to “each landowner affected by the proposed project and each person in possession of or residing on the property.” Section 479B.4 further defines “landowner” as “a person listed on the tax assessment rolls as responsible for the payment of real estate taxes imposed on the property.” Dakota Access asserts that it complied with the requirements of Iowa Code § 479B.4. Riley does not assert that Dakota Access did not send notice to the landowner or parties in possession as defined by that section, but instead argues that Dakota Access was required to send notice to all parties with an interest in the land and failed to do so. Since Iowa Code § 479B.4 only requires notice be sent to persons in possession or residing on the land and the person listed as responsible for paying the property taxes, staff recommends dismissal of the complaint on this issue as well.

III. Recommendation

Staff recommends the Board direct General Counsel to draft an order dismissing Riley’s complaint.

RECOMMENDATION APPROVED

IOWA UTILITIES BOARD

/BJF

/s/ Geri D. Huser 6-1-16
Date

/s/ Elizabeth S. Jacobs 6-1-16
Date

/s/ Nick Wagner 6-2-16
Date